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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SEALUTIONS, LLC et al.,

Plaintiffs and Appellants,

v.

CHARLES ROBERT SCHWAB, JR. et
al.,

Defendants and Respondents.

B285072

(Los Angeles County
Super. Ct. No. BC546925)

APPEAL from an order of the Superior Court of
Los Angeles County, Michael M. Johnson, Judge. Affirmed.

Steiner & Libo and Leonard Steiner; Larson O'Brien,
Stephen G. Larson, Paul A. Rigali and Lauren S. Wulfe; and
Litvak Law Group and Uri Litvak, for Plaintiffs and Appellants.

Allen Matkins Leck Gamble Mallory & Natsis, Robert R. Moore, Michael J. Betz, Alexander J. Doherty, for Defendant and Respondent Emergent Indonesia Logistics Fund.

In 2014, plaintiffs Nicholas Behunin (Behunin), The Grain Collective (Grain Collective), and Sealutions LLC (Sealutions) sued 12 defendants for a variety of tort and contract claims arising out the parties' former business dealings. Two years later, plaintiffs filed a fictitious name amendment substituting respondent Emergent Indonesia Logistics Fund (Fund), a Cayman Islands limited partnership, as a Doe defendant. Plaintiffs then purported to effect service on the Fund by sending a summons and complaint by certified mail to the Securities Administrator for the State of California, Department of Business Oversight. The Fund moved to quash service of the summons, and the trial court granted the motion. Plaintiffs appealed.

We affirm. In its federal and state securities filings, the Fund agreed that a designated officer of the state could accept service on its behalf only with regard to an action "aris[ing] out of any activity *in connection with the offering of securities*." Because plaintiffs have not established that their claims against the Fund arise out of the offering of securities, the trial court properly granted the motion to quash.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Present Action

Plaintiffs filed the present action in May 2014, and filed the operative first amended complaint (complaint) for fraud, negligent misrepresentation, breach of fiduciary duty,

constructive fraud, and breach of contract in April 2015. As relevant to the present appeal, the complaint alleged as follows.

In 2009, the Grain Collective (managed by Behunin) and defendant Big Sky Ventures III LLC (managed by defendant Michael Schwab), formed Sealutions to pursue environmentally conscious real estate investment and development.

Subsequently, Sealutions, defendant Live Oak Ventures LLC (controlled by defendant Charles Schwab), defendant Somerset Advantage LLC (managed by defendants Matthew Burwood and Timothy Albinson), and Michael Schwab formed defendant SeaChange LLC (SeaChange) to operate Sealutions' investment and development fund.

In about June 2011, Michael Schwab, Charles Schwab, Burwood, and Albinson formed a conspiracy to oust Behunin, Sealutions, and the Grain Collective from SeaChange. Pursuant to the conspiracy, Michael Schwab proposed that Sealutions' interest in SeaChange be transferred to a new entity to be created by Behunin and Schwab. Behunin agreed and signed an agreement terminating Sealutions' interest in SeaChange (the termination agreement). Thereafter, although Behunin and Michael Schwab created a new entity, Big Sky Asia PTE Ltd., Sealutions' interest in SeaChange was never transferred to it. Further, the individual defendants transferred SeaChange's assets to three new entities, defendants Emergent Capital Management LP, Emergent Capital Partners LLC, and Emergent Indonesia Opportunity Fund, in which Sealutions and Behunin did not have an ownership interest.

In addition to the above-described conduct by the named defendants, the complaint alleged the existence of additional, unnamed defendants whose names and capacities were unknown

to plaintiffs. With regard to those defendants, the complaint alleged that plaintiffs “are ignorant of the true names and capacities of defendants sued herein as Does 1 through 250, inclusive, and thereby sue these defendants by such fictitious names. Plaintiffs will amend this complaint to allege their true names and capacities when ascertained.”

B. Formation of Emergent Indonesia Logistics Fund LP

In 2015, the Fund was formed as a Cayman Islands limited partnership to solicit investments from private investors and invest the capital in real estate in Indonesia. Albinson is the Fund’s managing director.

On September 10, 2015, the Fund sold an equity interest to a California resident. Thereafter, on September 25, Albinson filed a Securities and Exchange Commission (SEC) Form D (“Notice of Exempt Offering of Securities”) with the SEC.¹ As required by California law, Albinson also mailed a copy of the Form D and a filing fee to the Department of Business Oversight in Los Angeles. (Corp. Code, § 25165.)

Under the terms of the Form D, the Fund appointed “the Secretary of the SEC and the Securities Administrator or other legally designated officer of . . . any State in which this notice is

¹ A Form D “is used to file a notice of an exempt offering of securities with the SEC. The federal securities laws require the notice to be filed by companies that have sold securities without registration under the Securities Act of 1933 in an offering made under Rule 504 or 506 of Regulation D or Section 4(a)(5) of the Securities Act. [¶] A company must file this notice within 15 days after the first sale of securities in the offering.” (<<https://www.sec.gov/smallbusiness/exemptofferings/formd>> [as of June 24, 2019].)

filed as its agents for service of process and agreeing that these persons may accept service on its behalf of any notice, process, or pleading . . . in connection with any Federal or state action . . . brought against the issuer in any place subject to the jurisdiction of the United States if the action . . . (a) arises out of any activity in connection with the offering of securities that is the subject of this notice and (b) is founded directly or indirectly upon the provisions of (i) the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, the Investment Company Act of 1940 or the Investment Advisors Act of 1940 or any rule or regulation under any of these statutes or (ii) the laws of the State in which the issuer maintains its principal place of business or any State in which this notice is filed.”

C. 2016 Amendment to Complaint

In June 2016, plaintiffs filed a fictitious name amendment in the present action, substituting the Fund as a Doe defendant. Plaintiffs did not otherwise amend the complaint. Plaintiffs then purported to effect service on the Fund by sending the summons and complaint by certified mail to the Securities Administrator for the State of California, Department of Business Oversight (DBO).

D. The Fund’s Motion to Quash Service of Summons

In May 2017, the Fund made a motion to quash service of summons. The Fund asserted that it was formed in the Cayman Islands and its principal place of business is in Singapore. The Fund does not have offices in California and does not conduct business in California, other than selling securities to a few California investors. The Fund maintains an agent for service of process in California only to accept service in connection with

actions arising out of the offering of securities in the United States. Accordingly, the Fund asserted that (1) it was not properly served with the summons and complaint, and (2) was not subject to the court's jurisdiction.

Plaintiffs opposed the motion to quash. Plaintiffs contended that but for the fraud alleged in the complaint, the Fund would have been operated by SeaChange, in which case plaintiffs would have been entitled to compensation under its agreements with some of the defendants. Plaintiffs further asserted that service was proper because the Fund's appointment of the DBO was not limited to actions claiming that securities were offered in violation of the Corporations Code, and the Fund had sufficient contacts with California to justify the court's exercise of jurisdiction over it. In support, plaintiffs provided evidence that Charles and Michael Schwab had interests in the Fund.

The trial court granted the motion to quash on August 4, 2017. The court found service was not effective because plaintiffs' claims against the Fund did not arise out of the offering of securities in the United States. Further, the court said it could not exercise personal jurisdiction over the Fund, a nonresident defendant, because the Fund did not have "continuous and systematic" contacts with California, and the suit was not alleged to arise out of or relate to the Fund's contacts with California. The court explained: "Plaintiffs argue that Charles Schwab has invested \$20 million in [the Fund] and Michael Schwab has a carried interest in [the Fund]. While that may be so, the present action concerns allegations that Sealutions was defrauded of its real estate interests in SeaChange LLC, and the connection with [the Fund] is hard to

discern. Plaintiffs apparently contend [the Fund] was used as a vehicle by which Sealutions was defrauded of its interests in SeaChange, and funds invested with [the Fund] would have otherwise gone to Plaintiffs. This argument is hard to follow and unsupported by any evidence. And in any event, it does not establish the kind of act, transaction or purposeful conduct that would support specific jurisdiction in California.”

Plaintiffs timely appealed from the order granting the motion to quash.²

DISCUSSION

Plaintiffs contend the trial court erred in granting the motion to quash because (1) the Fund was validly served with the summons and complaint, and (2) the court had general and specific jurisdiction over the Fund. As we now discuss, we need not reach the second issue because we conclude the Fund was never validly served with the summons and complaint.

I.

Standard of Review

“Personal jurisdiction over a nonresident defendant depends upon the existence of essentially two criteria: first, a *basis* for jurisdiction must exist due to defendant’s minimum contacts with the forum state; second, given that basis for jurisdiction, jurisdiction must be *acquired* by service of process in strict compliance with the requirements of our service statutes. ([Code Civ. Proc.], §§ 412.10–417.40.) Upon challenge by a specially appearing nonresident defendant pursuant to [Code of Civil Procedure] section 418.10, a plaintiff must establish that

² An order granting a motion to quash service of summons is an appealable order. (Code Civ. Proc., § 904.1, subd. (a)(3).)

both criteria are met. [Citations.]” (*Ziller Electronics Lab GmbH v. Superior Court* (1988) 206 Cal.App.3d 1222, 1229.)

“On a motion to quash service of summons, the plaintiff bears the burden of proving by a preponderance of the evidence that all jurisdictional criteria are met. [Citations.] The burden must be met by competent evidence in affidavits and authenticated documents; an unverified complaint may not be considered as supplying the necessary facts.” (*Nobel Farms, Inc. v. Pasero* (2003) 106 Cal.App.4th 654, 657–658.)

Where the record contains conflicting evidence, the trial court’s factual determinations are not disturbed on appeal if supported by substantial evidence. When no conflict in the evidence exists, however, the question of jurisdiction is purely one of law and the reviewing court engages in an independent review of the record. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 449.)

II.

The Trial Court Properly Granted the Motion to Quash Because the Fund Was Not Properly Served With the Summons and Complaint

There is no dispute that the Fund is a Cayman Islands limited partnership, which was formed in 2015 and whose principal place of business is in Singapore. There also is no dispute that the sole method by which plaintiffs purported to effect service on the Fund was by mailing (return receipt requested) a copy of the summons and complaint to the “Securities Administrator, State of California, Department of Business Oversight.” The essential question before us, therefore, is whether plaintiffs’ mail service of the summons on the DBO

caused the trial court to acquire personal jurisdiction over the Fund.

We conclude that plaintiffs' mail service of the summons on the DBO did *not* cause the court to acquire personal jurisdiction over the Fund. As noted above, by filing a Form D, the Fund appointed the "legally designated officer of the State" as its agent for service of process of "any Federal or state action . . . brought against the issuer . . . if the action . . . *arises out of any activity in connection with the offering of securities* that is the subject of this notice." (Italics added.) Assuming for purposes of argument that the DBO is the "legally designated officer of the State," service on the DBO would be proper only if plaintiffs' claims against the Fund arose "out of any activity in connection with the offering of securities."

We do not agree that plaintiffs have demonstrated a connection between their claims and the Fund's offering of securities. As the Fund notes, the complaint does not identify the Fund as a defendant, nor does it describe any misconduct allegedly committed by the Fund. And, while plaintiffs' June 3, 2016 amendment substitutes the Fund for "Doe 2," plaintiffs have never amended their complaint to allege the Fund's participation in any alleged torts or breaches of contract. Accordingly, we cannot conclude that plaintiffs' claims against the Fund "arise[] out of" the Fund's offering of securities.

In the appellants' opening brief, plaintiffs devote just one sentence to the contention that their claims arise out of the Fund's offering of securities: "[T]here can be no doubt that plaintiffs' action, as set forth in the [complaint], arises out of '*any activity in connection with the offering of securities*,' as it is alleged that [the Fund] was explicitly formed in order to further

accomplish defendants' fraud and breaches of fiduciary duty by further diverting assets that would have belonged to SeaChange, and to which plaintiff Sealutions would have been entitled to compensation and their carried interest, if not for the fraud accomplished by defendants in having Behunin sign the Termination Agreement by which Sealutions relinquished those interest[s]." Plaintiffs do not follow this statement with any citation to the record, nor has our independent review of the complaint revealed any allegations of misconduct by the Fund. We therefore need not consider it. (E.g., *Fierro v. Landry's Restaurant Inc.* (2019) 32 Cal.App.5th 276, 281 [declining to consider party's factual recitations not supported by accurate record reference]; *Rybolt v. Riley* (2018) 20 Cal.App.5th 864, 868 [appellate courts may "disregard any factual contention not supported by a proper citation to the record"].)

Accordingly, we conclude that the trial court did not err in granting the motion to quash.

DISPOSITION

The order granting the motion to quash is affirmed.
Respondent is awarded its appellate costs.

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EDMON, P. J.

We concur:

EGERTON, J.

DHANIDINA, J.